TUC
Changing the world of work for good

Protection from detriments for taking industrial action

Trades Union Congress response to a Department for Business and Trade consultation. April 2026

Introduction

The TUC is the voice of Britain at work. We represent more than 5.3 million working people in 47 unions across the economy. We support unions to grow and thrive, and we stand up for everyone who works for a living.

The TUC strongly welcomes the government's preferred option of prohibiting *all* detriments for taking industrial action.

As recognised by the Supreme Court in *Secretary of State for Business and Trade v Mercer,*[1] protections against trade union detriment must be extended to detriments short of dismissal to address a long-standing gap in the law. The judgment confirmed that the existing legal framework did not protect workers from detriment for participating in industrial action, a gap that is incompatible with the fundamental right to freedom of association under Article 11 of the European Convention on Human Rights. In practice, this legal vacuum has a pernicious and chilling effect, discouraging workers from exercising their rights for fear of being penalised, whether through disciplinary warnings, loss of opportunities, or other hidden detriments that fall short of dismissal but still cause real and material harm.

The government's *Plan to Make Work Pay* stated that:

> *"Labour will update trade union legislation so it is fit for a modern economy, removing unnecessary restrictions on trade union activity and ensuring industrial relations are based around good faith negotiation and bargaining."*[2]

The government's proposed approach in this consultation paper is consistent with its aims of supporting collective rights. It is vital that the law isn't drafted in a way that allows employers to identify areas where detriment could be applied without legal risk. There is, therefore, a need to ensure that the government takes a robust approach to the implementation of this provision, without carve-outs or exceptions.

Trade unions are essential for rebalancing power in the labour market. While taking industrial action is a last resort for workers seeking to bring an employer to the table for meaningful negotiation, workers' ability to withdraw their labour underpins the successful resolution of many disputes before strike action has taken place. The threat of detriments as a result of taking industrial action therefore undermines this. The government must take an expansive approach to prohibitions on detriments to ensure its commitment to empowering workers and rebalancing industrial relations.

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[1] *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12.

[2] Labour Party (2024). '*Labour's Plan to Make Work Pay*'. p.12.

OPTION A – Prohibit all detriments for taking industrial action

Question 1

Do you support prohibiting all detriments for taking industrial action?

The TUC strongly supports Option A (prohibit all detriments for taking industrial action).

As recognised by the Supreme Court in *Mercer*, the European Court of Human Rights (ECtHR) has found that the right to strike underpins the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members, and the right to engage in collective bargaining. As highlighted in *Mercer,* the "*core right to advocate for the interests of trade union members is devoid of substance if it not backed by the right to take strike action."*[3] A long-established strand of Strasbourg case law, established in *Karaçay v Turkey*[4] and reaffirmed in *Güler v Turkey,*[5] finds that even minor sanctions that discourage or punish trade union members for taking part in lawful strike action breach Article 11. Option A would address the risk of incompatibility with Article 11 rights.

International Labour Organisation (ILO) Convention No 98 1949 (Application of the Principles of the Right to Organise and to Bargain Collectively) and European Social Charter demand protection against any harmful consequence or prejudice to a worker by reason of trade union activities. Moreover, the ILO Committee on Freedom of Association had stated that "*no one should be penalized for carrying out or attempting to carry out a legitimate strike*" (with the exception of *proportionate* wage deductions corresponding to the strike period).[6] Therefore, a comprehensive prohibition on detriments for taking industrial action would be consistent with the UK's international obligations. The TUC further notes that disproportionate deductions, including for partial performance during industrial action, is widespread and should be robustly addressed.

Detriment is a pernicious harm with serious repercussions for workers seeking to enforce their rights and improve conditions across their workplaces and sectors. For example, during the CWU's dispute with Royal Mail in 2022/23, which involved 18 days of strike action by CWU members, Royal Mail introduced a number of measures aimed at undermining support for industrial action. These included disproportionate disciplinary sanctions, the vast majority of which were overturned following an

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[3] *Mercer* [2024] at note 1, para 70.
[4] (App. No. 6615/03, 27 March 2007).
[5] [2018] IRLR 880.
[6] ILO (2018). *Freedom of association: compilation of decisions of the Committee on Freedom of Association*, 6th ed. para 943 and 953.

independent review led by Lord Falconer;[7] restrictions of sick pay; and the reallocation of expected overtime to agency workers.

Similarly, RMT has highlighted how its members in guard and other on-train grades and vulnerable workers on outsourced contracts in the rail industry have experienced detrimental treatment from their employer as a direct consequence of participating in official industrial action. During the 2016–2018 dispute with Southern Rail, RMT members were subjected to detriments, such as the removal of free travel passes for members, their families and dependants; the withdrawal of car parking permits; the withholding of all pay until travel passes and parking permits were returned; and the refusal of applications for rest day (overtime) working. In addition, senior managers at Southern Trains wrote to staff threaten them with 'additional individual sanctions', short of dismissal, for participation in official RMT industrial action.[8]

The RMT response to this consultation highlights that RMT members employed on the Northern Trains contract operated by Carlisle Support Services have similarly faced detriment for participating in industrial action arising from the employer's refusal to engage in pay negotiations. Managers at Carlisle have repeatedly warned that participation in lawful strike action could result in reduced shifts and the loss of holiday entitlements.

These examples illustrate that actions short of dismissal can have significant consequences for workers, ranging from considerable negative financial impacts, denying career development and training opportunities, worsening working conditions, and mental health impacts among others. Further, it demonstrates how employers have used detriment to coerce and intimidate members rather than negotiate in good faith.

Question 2

What benefits might come from prohibiting all detriments for taking industrial action?

The TUC's position is that the prohibition of *all* detriments imposed where penalising, preventing, or deterring participation in official industrial action was a material contributing factor should be enshrined in legislation. This approach:

- Best complies with the Supreme Court's judgment in *Mercer* (which identified a gap for detriments short of dismissal)

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[7] CWU (2023). *LTB 287/23 – Outcome of the Lord Falconer Independent Review – CWU/RMG Collective Agreement.* Available at: https://www.cwu.org/ltb/ltb-287-23-outcome-of-the-lord-falconer-independent-review-cwu-rmg-collective-agreement/ (Accessed 9 April 2026).

[8] Gillet, F. (2017). "Southern Rail strike: RMT union accuses train company of bullying staff as strike looms". *The Standard.* 20 February 2017. Available at: https://www.standard.co.uk/news/transport/southern-rail-strike-rmt-union-accuses-train-company-of-bullying-staff-as-strike-looms-a3470596.html (Accessed 20 April 2026).

- Minimises the risk that protections are in tension with Article 11 (freedom of association and assembly)
- Futureproofs protections by avoiding the creation of loopholes that an exhaustive list of detriments would inevitably create, particularly through novel sanctions
- Promotes good industrial relations through encouraging good faith bargaining and negotiation
- Offers more extensive protections for workers
- Keeps pace with international practice
- Achieves consistency in treatment of private and public sector workers

Compliance with Mercer and Article 11

A comprehensive prohibition is the only approach that genuinely closes the gap identified by the Supreme Court in *Mercer*, which confirmed that UK law currently provides no protection against detriment short of dismissal for taking part in lawful industrial action and is therefore incompatible with Article 11 ECHR.

By prohibiting all detriments imposed for the sole or main purpose of penalising, preventing or deterring participation in industrial action, Option A would close that gap decisively, rather than risking its re-emergence through a specified list. A blanket prohibition would also reduce the risk of further litigation over whether particular detriments fall inside or outside the scope of protection, strengthening legal certainty and ensuring that the right to strike is protected in substance as well as in form, in line with the Supreme Court's reasoning in *Mercer*.

Future proofing protections

A general prohibition prevents employers acting in bad faith by trying to circumvent specified protections within the list.

Option A would create a flexible, durable framework that can adapt to changes in employment practices, industrial relations, and employer behaviour without requiring continual legislative updates. By prohibiting all detriments connected to taking industrial action, the law would avoid the risk that new or unforeseen forms of employer retaliation fall outside protection simply because they were not anticipated or listed at the time regulations were drafted. This approach would prevent loopholes emerging as workplaces evolve and would reduce the likelihood of employers devising novel detriments to circumvent a prescribed list. A blanket prohibition would also minimise the need for frequent secondary legislation or judicial interpretation to keep pace with change. This would provide long-term clarity and consistency for workers, employers, and tribunals alike, and ensure that protections remain effective as labour market practices develop.

Promoting good industrial relations

The Employment Rights Act seeks to remove "*unnecessary restrictions on trade union activity and ensuring industrial relations are based around good faith negotiation and*

bargaining". It is consistent with this approach to ensure that no detriments for taking industrial action are permissible to ensure that efforts are focused on resolving the issues at the heart of a dispute.

Strengthened protections for workers

As highlighted in our response to question 1, actions short of dismissal can have a significant detrimental impact on workers. For instance, the loss of overtime pay would hit household income. Being transferred to another work site could affect work/life balance. A worker might also lose trust in their employer. In practice, the consequences of actions short of dismissal may amount to impacts that are functionally similar to dismissal – for instance, if a worker feels that, due to the impacts, they have no choice but to leave.

Keeping pace with international practice

Option A is consistent with other European countries, which have taken expansive and open-ended approaches. Typically, this includes prohibitions of all acts that harm or discriminate against workers as well as other prejudicial treatment, rather than delineating specific detriments beyond the exception of *proportionate* wage deductions for time not-worked.[9]

Allowing detriment in only certain instances would take Great Britain below the legal standard established in other European countries such as France, Germany, Italy, Spain and Sweden among others.[10]

Consistency in treatment of private and public sector workers

Preventing all forms of detriment would help ensure that workers who take industrial action are treated similarly by both private and public employers. Public authorities are bound by section 6 of the Human Rights Act 1998 to act compatibly with the ECHR, thereby limiting their ability to subject workers to detriment. For private employers, they do not hold the same obligation. As highlighted in the consultation document, a comprehensive ban would create consistent expectations across sectors and avoid a patchwork of standards.

Question 3

What concerns or challenges do you see from prohibiting all detriments for taking industrial action?

The consultation notes that detriments imposed for genuine misconduct during industrial action are not prohibited. There is a risk that some employers may re-label

[9] Katsaroumpas I. *et al.* (2025). *Tackling hidden retaliation for strike participation. Examples of legal protection from detriments short of dismissal*. ETUI. pp.3-5.
[10] Katsaroumpas I. *et al.* (2025) at note 9. pp.3-4.

participation-related behaviour as misconduct, or use broad, ambiguous categories (e.g., "bringing the employer into disrepute") to justify detriments.

Option A suggests that *all* detriments should be prohibited where penalising or deterring participation in official industrial action is the sole or main reason. Limiting it to instances where it is the *sole or main reason* will create evidential challenges. As in other areas such as whistleblowing protections, the ability of unscrupulous employers to conceal their primary motive by suggesting another reason is the primary motivator will hamper the ability of workers use this protection. Clear guidance must be provided to address this evidential challenge, and to avoid such cases to have to progress through an employment tribunal to decide. If the government proceeds with the wording of 'sole or main reason' it should keep this under review to ensure that it is not abused by employers to evade accountability for subjecting workers to detriments.

As an example, the consultation explicitly mentions that disciplinary measures against a worker for bringing the company into disrepute could be permitted. This justification for anti-union behaviour is common and has a serious chilling effect on workers being vocal about poor practice by their employer. Many union campaigns have a public-facing dimension, and as such, legitimate campaigning may affect the employer's reputation. It is, nevertheless, often a key feature in industrial action. Allowing detriment under the cover of disciplining workers for bringing the company into disrepute can be used as a cover for trade union detriment. Indeed, in the context of *Mercer*, the employer alleged that Fiona Mercer had spoken to the press during the industrial action in a way which conveyed confidential information and was considered likely to bring them into disrepute.[11] This was used as part of the justification for her original suspension which triggered the legal challenge.

Question 4

How might prohibiting all detriments for taking industrial action influence employers' ability to manage workplace disputes and industrial action?

The consultation notes that protecting workers from detriment supports "*industrial relations conducted with integrity, fairness and mutual respect*."[12] When employers impose detriments (e.g., shift changes, bonus removal, performance downgrades), this deepens the dispute, increases worker mistrust, hardens positions on both sides and can prolong industrial action. Option A therefore encourages employers toward problem-solving behaviours, rather than the use of detriments to coerce workers. In this sense, Option A would result in earlier, good-faith negotiation, reduced escalation

[11] *Mercer* [2024] at note 1. para. 26.
[12] UK Government (2026). '*Make Work Pay: Protection from detriments for taking industrial action*', p.2.

and breakdowns of trust, and would create a more stable industrial relations environment.

Option A does not prevent employers from managing genuine misconduct. It will mean that workers and trade unions are able engage in lawful industrial action without insidious practices being deployed against in a manner that impinges on their rights.

Prohibiting all detriments provides clarity and consistency for employers during disputes. The government explicitly acknowledges that a broad prohibition gives greater clarity and reduces the likelihood of employers accidentally breaching the law or navigating a complex list of permissible and impermissible actions. This benefits employers by reducing legal uncertainty and minimising inadvertent breaches. A simpler rule ("don't impose any detriment because of industrial action") is easier to communicate to managers and apply in practice.

Question 5

Would this option have an impact on industrial relations?

Prohibiting all detriments would have a positive and stabilising impact on industrial relations. In its *Plan to Make Work Pay*, the government emphasised its intention to ensure "*industrial relations are based around good faith negotiation and bargaining*." It went on to recognise that the "*existing framework for industrial relations and collective bargaining is rife with inefficiencies and anachronisms that work against cooperation, compromise and negotiation*." In the *Mercer* judgment, the Supreme Court recognised that industrial action is an integral part of unions' ability to advocate for their members' interests.[13] Workers' ability to withdraw their labour underpins the successful resolution of many disputes before strike action has taken place by encouraging employers to take concerns seriously. It encourages earlier, more meaningful engagement and dispute resolution. The government acknowledges that stronger industrial action protections support "*effective industrial relations*" and encourage cooperation between employers and workers.[14]

A broad, non-exhaustive prohibition on detriments would strengthen trust, reduce conflict escalation, and support more constructive dispute-resolution for the reasons set out in the answer above. This direction of travel is directly aligned with the government's stated aim of ensuring industrial relations are conducted with "*integrity, fairness and mutual respect*." Permitting detriments has a deleterious effect on mutual trust and increases adversarial behaviour. It would also reduce the escalation of disputes caused by punitive employer tactics. A blanket ban removes this dynamic, reducing opportunities for harmful or provocative employer behaviour during disputes.

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[13] *Mercer* [2024] at note 1. para 70.

[14] UK Government (2026) at note 11, p.2.

By removing the threat of retaliatory sanctions, workers are more likely to feel secure in exercising their rights, decreasing the potential for unnecessary antagonism and fostering a more open bargaining environment. Without the ability to impose detriments, employers must rely on engagement, negotiation, and resolution, rather than punitive and counterproductive tactics. Moreover, implementing a blanket prohibition strengthens the legitimacy of the industrial relations framework and reduces potential for future litigation or uncertainty.

OPTION B - Create a list of prohibited detriments

Question 6

Do you support creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

No. The TUC strongly objects to this option for the reasons set out in our responses to questions 1-5.

The position that the Supreme Court outlines in *Mercer* regarding the understanding that Article 11 does not require universal protection against detriment in all circumstances should be read narrowly within its context. In paragraph 83 of the *Mercer* judgement, the Supreme Court states:

> *"In my judgment the state's positive obligations under article 11 do not require it to confer universal protection in all circumstances to all workers against any detriment (however slight) intended to dissuade or penalise them from participating in a lawful strike. If that were the case, the conditions that must be fulfilled to attract the protection from dismissal afforded under Part V of TULRCA would be incompatible with the UK's obligations under article 11, and RMT would have been decided differently. Equally, it would be surprising if sanctions could not be imposed in circumstances where an employer could permissibly dismiss an employee for participation in a lawful strike. There may be circumstances where it is permissible to impose a detriment for participating in lawful strike action where employees have necessarily acted in breach of contract, particularly where the manner of the breach is harmful or disruptive."*

"Harmful or disruptive" breaches of contract are caught by the need to ensure that the detriment is motivated by the sole or main purpose of preventing, deterring or penalising participation in industrial action. In such instances, a worker is penalised for harmful or disruptive breach, as opposed to the industrial action itself. As this is captured through the sole or main purpose test, creating specified detriments to capture such behaviours is unnecessary and would complicate and confuse the picture.

Questions 7, 8, 9 & 10

The TUC is strongly opposed to creating a specific list of detriments for the reasons outlined in our responses to questions 1-5. The TUC strongly supports Option A.

Question 11

Would this option have an impact on workers' willingness to participate in industrial action?

Option B would have a chilling effect on workers' willingness to participate in industrial action. Workers would be fearful that they could be subjected to specific detriments without legal recourse.

Certain detriments such as suspensions, and denied career development opportunities, among others can result in real material harm for workers, such as the loss of income. Particularly for workers in low paid roles, this could seriously dissuade them from participating in industrial action.

It would also have a broader effect in distorting power in the workplace. Workers only undertake industrial action as a last resort. But the mere threat of industrial action can be enough to bring an employer to the negotiating table to resolve a dispute. Permitting certain detriments therefore would reduce the power of workers and make it harder for them to persuade employers to settle disputes.

Question 12

Would this option impact employers' ability to manage disputes and industrial action?

The TUC's position is set on in the response to questions 4-5.

Section 3 – Awards for failing to comply With Acas Code of Practice

Q13. Should claims made under Section 236A of TULRCA be added to Schedule A2, meaning that an employment tribunal can adjust an award by up to 25% where the employer or employee unreasonably failed to follow the Acas Code of Practice on Disciplinary and Grievance Procedures?

Yes. Claims made under Section 236A of TULRCA should be added to Schedule A2.

Detriments are a pernicious harm that must be taken seriously and tackled robustly. As highlighted above, and by *Mercer*, detriments can flagrantly interfere with workers' human rights.

Adding claims made under Section 236A of TULRCA to Schedule A2 would reinforce the expectation that employers handle disputes arising from industrial action fairly, consistently, and in accordance with established procedural standards. It would also promote parity with other detriment-based protections under TULRCA, ensuring that workers bringing section 236A claims are not placed at a relative disadvantage. By strengthening incentives for compliance and good-faith engagement, inclusion in Schedule A2 would support early resolution of disputes, reduce unnecessary litigation, and enhance the practical enforceability of the right to take industrial action without fear of retaliation.

Q14. Is there anything else on this subject that the government should consider?

The government should consider additional measures to strengthen the existing regime.

As it stands, only individual workers are entitled to bring claims to an Employment Tribunal. This stands in contrast to other European countries, such as France, Italy, and Germany among others, where unions are permitted to bring claims.[15] Trade unions should be able to bring actions before a court on behalf of a victim or a group of victims of adverse impacts, and should have the rights and obligations of a claimant party in the proceedings, without prejudice to existing law.

Workers who have suffered a detriment will only be entitled to a declaration and compensatory damages. But in other European countries remedies can extend to the issuing of injunctions, annulment of the detriment and administrative penalties based on the size of the employer and severity of the breach (e.g., the Portuguese Labour Code PLC Article 554, par. 1).[16] Similar powers to declare detriments short of dismissal null and void would bring Great Britain further in line with comparable European countries and would enhance protections for workers.

[15] Katsaroumpas I. et al. (2025) at note 9, pp.8-9.
[16] *Ibid*, pp.7-8.